UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DTM CORPORATION

and

Case 16-CA-27094

SECURITY, POLICE, FIRE PROFESSIONALS OF AMEERICA, LOCAL 48

RESPONDENT DTM CORPORATION'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent DTM Corporation (DTM), by its undersigned counsel, hereby submits its Brief in Support of its Exceptions to the June 30, 2010, Decision of Administrative Law Judge William N. Cates in the above-referenced matter, and in support thereof states as follows:

I. BACKGROUND

DTM Corporation is a minority owned, privately held contractor that provides security guard services to government facilities including the Air Traffic Control Center (FAA Tower) at the Dallas Ft. Worth International Airport in Ft. Worth, Texas. (Tr. 23). DTM is party to a collective bargaining agreement (CBA) with the Security, Police, Fire Professionals of America, the Union that represents its security officers at FAA Tower, which became effective on September 21, 2009. (GC Ex. 2). The security officers are responsible for controlling and monitoring all access to the FAA Tower, checking identifications, patrolling and monitoring all facilities and FAA Tower property, and maintaining the safety and security of all personnel and operations at this highly sensitive

facility in which air traffic controllers are responsible for directing and controlling air traffic in the area and beyond. (Tr. 23, 50-51).

DTM places almost no restrictions on the security officers when it comes to distributing union materials or discussing union matters in the workplace, as long as these actions do not directly interfere with their work. (Tr. 55). Security officers take breaks throughout the day in a kitchenette they use as their breakroom. (Tr. 53). DTM does not in any way regulate or restrict their activities while they are on break. (Tr. 53). Nor does DTM regulate their activities when the security officers are on site before or after their work time, or in the FAA Tower parking lot. (Tr. 53, 54). Even when the security officers are on duty, if they are not actually engaged in their work as armed security officers they are freely able to discuss and distribute whatever they want, including information and materials relating to labor and union matters. (Tr. 53). The security officers are also allowed to post union materials on a bulletin board maintained in the primary work area. (Tr. 54).

Lloyd Tyson, the President of Local 48 of the Security, Police, Fire Professionals of America Union (Local), the Charging Party in this case, testified that DTM pdoes not restrict the security officers when it comes to soliciting and distributing to each other. (Tr. 30). For example, the security officers discussed and distributed to one another the Notice threatening DTM with a strike on November 2, which Notice led to the underlying Charge. (Tr. 30-31, 33). Tyson understood that there was no restriction on handbilling or leafleting. (Tr. 31). Likewise, the security officers were able to post materials relating to this Charge on the bulletin board in the primary work area. (Tr. 54). As Tyson confirmed,

both in the CBA and in practice, the security officers are "allow[ed] to communicate with your fellow officers about the union while you're at the work site." (Tr. 34).

The issues that led to this case arose when the International Union negotiated the above-referenced CBA with DTM, but apparently did not keep the Local Union advised, or even let the Local know that a new CBA had been negotiated. (Tr. 28). In October 2009 the Local and its member security officers at the FAA Tower issued a "Notice" to DTM in which they threatened that "on November 2, 2009 at or about 1100, the Security Officers working for DTM Corporation will be performing an Informational Picket and/or Strike in FAA/ARTCC in Fort Worth, Texas." (GC Ex. 3; tr. 45). DTM, which is alone responsible for securing and protecting the FAA Tower and all of the air traffic controllers and other employees who work there, had to respond quickly to the strike threat. As Tyson testified, "DTM had to put together a plan in case [the Union] acted on that threat" as "it had to make sure the security of that facility was maintained". (Tr. 38). Tyson testified that DTM responded to the strike threat by educating the officers on the new CBA, and that DTM did not threaten them or attempt to intimidate them. (Tr. 44, 57). DTM distributed a letter dated October 21, 2009 to each of the security officers explaining the situation, together with a copy of the new CBA. (GC Ex. 4; Tr. 57, 59).

After the CBA was provided to the security officers there was no strike or other job action, and no employees were disciplined over the strike threat. (Tr. 40). As Tyson explained, the whole misunderstanding "was the International's fault". (Tr. 41).

The General Counsel (GC) issued a complaint against DTM only (and not against the International with which DTM negotiated the CBA) alleging that through the CBA,

DTM "promulgated and maintained" unlawful rules restricting the ability of the security officers when it came to handbilling, leafleting and engaging in work actions that constitute protected, concerted activities." (Complaint para. 7). The ALJ found that DTM had promulgated and maintained a rule in its CBA that unlawfully restricted the ability of the security officers to handbill, leaflet and engage in other protected work actions. The ALJ found further that the limitation on leafleting and handbilling was not part of a lawful no-strike provision. (ALJ Dec. 9, lines 4-10, 21-25). DTM excepts to the findings of the ALJ as set forth below.

II. ARGUMENT

A. Article IX of the CBA is a lawful waiver of the ability of Union members to engage in strike-related activities and, as a result, exceptions 1, 2, 3, 4, 5, 6 and 7 should be granted.

"No strike" clauses can lawfully "forbid explicitly a wide range of employees' strike-related activity, i.e., other than the simple withholding of labor." U.S. Steel Corp. v. N.L.R.B., 711 F.2d 772, 780 (7th Cir. 1983) (discipline of employee for leafleting and honoring picket line upheld: "where a broad no-strike clause is functionally independent of an arbitration clause in a labor contract and the contract shows that the no-strike obligation was not given merely in exchange for the duty to arbitrate but because of the parties' common interest in achieving uninterrupted plant operations, the no-strike clause constitutes a clear and unmistakable waiver"). See also Bethlehem Steel Corp. v. NLRB, 670 F.2d 331, 336 (D.C. App. 1982) (a no strike clause is valid and enforceable where it "explicitly states that during the term of the agreement 'neither the Union nor any Employee shall instigate, encourage, sanction, or take part in any strike, sit-down,

slowdown or other stoppage, limitation or curtailment of work or production, or take part in any picketing, boycotting or other interference with or demonstration against any Yard or its business or operations, either in such Yard or elsewhere. . . . The Company may terminate the employment of or otherwise discipline any Employee who willfully violates any of the provisions of this Agreement in any material respect"); Renal Care of Buffalo, 347 NLRB 1284 (2006) ("[i]nsisting on a no strike/no lockout proposal that would prohibit employees from engaging in protected activity including handbilling" was lawful); Englehard Corp., 342 NLRB 46 (2004) (recognizing the ability of an employer and the union to negotiate a no strike provision that could explicitly waive the right of informational picketing).

Article IX in the FAA Tower CBA is the "No Strike and No Lockout" clause. It provides that "the Employer agrees not to cause, permit, or engage in any lockout of its employees during the term of this Agreement. The Union agrees that neither it nor the employees it represents covered by this Agreement will, during the term of this Agreement, cause, permit, or take part in any strike, including sympathy strike, picketing, leafleting, informational picketing or any other work action that has the purpose or effect of slowing down or interfering with work."

The ""No Strike and No Lockout" clause clearly prohibits a variety of strike-related actions. Nevertheless, the ALJ found Article IX to be ambiguous, and/or to apply to activities unrelated to strikes. The title of Article IX" No Strike and No Lockout" – makes it unmistakably clear what the subject matter of this Article is – a prohibition against strikes and lockouts. The restrictions in the Article prohibit employees from "**tak[ing]**

part in any strike, including" - after which the prohibited strike-related activities are listed. There is no confusion or ambiguity when it comes to what the word "including" means. "Including" is defined as: "to have as part of a whole; contain; compromise ...; 3. to consider as part of a whole. *Webster's New World Dictionary* 1143 (2d College ed., 1978). "Including" suggests the containment of something as component or subordinate part of a larger whole. *See Webster's Ninth New Collegiate Dictionary* at 609. So, when Article IX references "or take part in any strike, including sympathy strike, picketing, leafleting, informational picketing" it is, by clear terms, detailing the different "strike" related activities that are included in the prohibition against strikes.

B. <u>The CBA includes a lawful restriction on solicitation activities and, as a result, exceptions 1, 2, 3, 4, 5, 6 and 7 should be granted</u>.

Article XXI, section 4 of the CBA only precludes, as a general rule, employees from conducting union-related business while they are on duty. It states as follows: ". . . . nor shall any employee conduct Union-related business during the time he/she is on duty without permission." Article XXIII of the CBA, the "Access" clause, which addresses the rights of Union officials to access FAA Tower property, supplements those restrictions as follows:

> One Union Business Representative, or any duly authorized representative of the Union, shall have admission to the establishment of the Employer only after giving a minimum of seventy-two (72) hours advance written notice of his desire to be on the premises to the Employer's Project Manager or duly authorized designee, except in cases of emergency making such advance notice impossible, in which case as much advance notice as is possible must be given. While on the premises, the Business Representative or any duly authorized union representative shall only be allowed to meet with bargaining unit employees for the purpose of ascertaining whether or not this Agreement is being observed by the parties hereto or for assisting in the adjustment of grievances. Any meetings can only take place in non-

> work areas, during non-work time. Such visits shall not interfere with the orderly and efficient operation of the Employer's business. There shall be no Union business or solicitations during work time and/or in work area of either the person doing the soliciting, or the person being solicited, unless such solicitations are express permitted under the terms of this Agreement.

These restrictions, which permit bargaining unit employees to engage in union-related activities as long as they are not on duty, and allow them to meet with their Union representatives as long as they are not on duty or in their specific work areas, make it clear that employees may engage in union activities and solicitations when they are off duty, and are lawful. See, e.g., Our Way, Inc., 268 NLRB 394 (1983) ("rules prohibiting solicitation during working time are presumptively lawful because such rules imply that solicitation is permitted during nonworking time, a term that refers to the employees' own time").

The ALJ relies on NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974) in support of his claim that Article IX represents an unlawful restriction on the activities of the security officers. In that case, the Supreme Court held that "a ban on the distribution of union literature or the solicitation of union support by employees at the plant during nonworking time may constitute an interference with section 7 rights. . . . So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time banning of that solicitation might seriously dilute section 7 rights."

At issue in Magnavox Co. was the ability of a union to waive, on behalf of its members, their ability to solicit and distribute to each other during non-working time. The concern was that such a waiver would seriously impair their rights, particularly when it came to their right to choose a bargaining representative. See Lee v. NLRB, 393 F.3d 491 (4th Cir. 2005) ("a union may bargain away its member's economic rights, but it may not

surrender rights that impair the employees' choice of bargaining representative") (citation omitted); Southwestern Bell Telephone Co. v. NLRB, 667 F.2d 470, 476 (5th Cir. 1982) ("Courts that have invalidated a clear contractual waiver of an employee's individual rights have done so only when the waiver is that of the employee's right to exercise his basic choice of a bargaining representative"); Prudential Insurance Co. v. NLRB, 661 F.2d 398, 400-01 (5th Cir. 1981) ("Courts which have invalidated a clear contractual waiver of an employee's individual statutory right have done so only when the waived right affects the employee's right to exercise his basic choice of bargaining representative"); NLRB v. Mid-States Metal Products, 403 F.2d 702, 705 (5th Cir. 1968) ("solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of a union. We cannot presume that the union, in agreeing to bar such activities does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative").

The concerns addressed by the Court in Magnavox Co. are not present in this case. As set forth above, not only are the restrictions in the CBA lawful on their face, but the practice at the facility has been to allow the security officers the freedom to solicit and communicate with other employees and the Union.

C. DTM communicated to the officers that they can distribute and solicit and they freely do so and, as a result, exceptions 1, 2, 3, 4, 5, 6 and 7 should be granted.

Even if Article IX was somehow deemed to be problematic, when a rule of this kind is found presumptively unlawful on its face "the employer has the burden of showing

that it communicated or applied the rule in such a way as to convey an intent clearly to permit solicitation during breaktimes or other nonwork periods." Ichikoh Mfg., 312 NLRB 1022 (1993), enfd. 41 F. 3d 1507 (6th Cir. 1994).

As set forth above, it was undisputed that the security officers they are freely able to discuss and distribute whatever they want, including information and materials relating to labor and union matters, without restriction. They are also allowed to post union materials on a bulletin board in the primary work area, and to distribute such materials to each other. DTM has easily established that it communicated or applied any rules in a way that conveyed a clear intent to permit distribution of literature and solicitations as long as the security officers focused on their duties when they were actually working.

D. The ALJ's interpretation of Article IX and disregard of the circumstances must be rejected and, as a result, exceptions 1, 2, 3, 4, 5, 6 and 7 should be granted.

The facts aren't in dispute. Because of a misunderstanding between the International and the Local regarding the status of the negotiations over a new collective bargaining agreement, the Local issued a Notice stating that it might strike a highly sensitive government installation, which DTM was alone responsible for securing. DTM responded by educating the security officers on the fact that there was a CBA in place (they believed that there was no CBA, or wage increases pending).

The CBA prohibits all forms of strike activities, "including" strike-related activities that involve handbilling and picketing. The CBA also permits bargaining unit employees to engage in union-related activities as long as they are not on duty, and allows them to meet with their Union representatives as long as they are not on duty or in their work area.

It is conceded that employees have never been improperly restricted when it comes to communicating about union-related matters.

The ALJ's effort to find ambiguity where there is none, disregard portions of the CBA that refute his position, and otherwise try to concoct section 7 violations in an environment where there are none present (and you could not find a more union-friendly employer), must be rejected. As the NLRB has previously held under similar circumstances, a common sense, practical approach should prevail:

> We conclude that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. In this regard, the rule, in providing that it is unacceptable for employees to engage in conduct that does not support the Respondent's "goals and objectives," addresses legitimate business concerns, including, as the rule specifically states, being "uncooperative with supervisors, employees, guests and/or regulatory agencies." We find no ambiguity in this rule as written. Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase "goals and objectives" in isolation, and attributing to the Respondent an intent to interfere with employee rights. We are unwilling to place such a strained construction on the language, and we find that employees would not reasonably conclude that the rule as written prohibits Section 7 activity. Furthermore, the Respondent has not by other actions led employees reasonably to believe that the rule prohibits Section 7 activity. Thus, the Respondent has not enforced the rule against employees for engaging in such activity, and there is no evidence that the Respondent promulgated the rule in response to union or protected concerted activity or that those employees even engaged in any such activity. Moreover, there is no evidence that the Respondent exhibited antiunion animus. In these circumstances, to find the maintenance of this rule unlawful, as do our dissenting colleagues, effectively precludes a common sense formulation by the Respondent of its rule and obligates it to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply. Such an approach is neither reflective of the realities of the workplace nor compelled by Section 8(a)(1). We find that the General Counsel has not met his burden of showing that the maintenance of this rule would reasonably chill employees in the exercise of their Section 7 rights.

Lafayette Park Hotel, 326 NLRB 824, 825-26 (1998).

E. <u>The International was a necessary party and, as a result, exception 8 should be granted</u>.

The International Union, which negotiated Article IX in the FAA Tower CBA, and is party to the CBA, was not named in the Complaint. Yet, the "No Strike and No Lockout" clause at issue places the burden *on the Union* to ensure "that neither it nor the employees it represents covered by this Agreement will, during the term of this Agreement, cause, permit, or take part in any strike, including sympathy strike, picketing, leafleting, informational picketing or any other work action that has the purpose or effect of slowing down or interfering with work." Furhter, the allegation in the Complaint is *the* Union cannot waive such rights on behalf of its members. With enforcement of Article IX the responsibility of the International Union, and its decision to bargain away certain rights in exchange for other benefits for its members, there is no basis for excluding the International Union from this case, or for allowing it and its members to retain the benefits of the other terms and conditions negotiated in the CBA while DTM loses the benefits of the protection it secured in exchange.

III. CONCLUSION

For these and all of the foregoing reasons, the General Counsel has failed to meet its burden of establishing that DTM engaged in unlawful conduct. As such, DTM Corporation respectfully requests that its Exceptions be granted, and that the Complaint be dismissed, with prejudice.

DATED this 28th day of July, 2010.

Respectfully submitted,

Scott Kamins
Offit Kurman
8171 Maple Lawn Blvd., Suite 200
Maple Lawn, MD 20759
(301) 575-0347 (phone)
(301) 575-0335 (facsimile)
skamins@offitkurman.com